No. 80-1765

Office-Supreme Court, U.S.
FILED
MAY 21 1981
ALEXANDER L. STEVAS,
CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1980

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THE AMERICAN SOCIETY OF MECHANICAL ENGINEERS, INC.,

*Petitioner,*

v.

HYDROLEVEL CORPORATION,

*Respondent.*

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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## BRIEF AMICUS CURIAE OF THE AMERICAN NUCLEAR SOCIETY IN SUPPORT OF PETITIONER

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## INTEREST OF AMICUS CURIAE

The American Nuclear Society (ANS) respectfully submits this brief in support of petitioner, the American Society of Mechanical Engineers (ASME), pursuant to Supreme Court

Rule No. 36. Consent to the filing of this brief has been granted by counsel for all parties. These letters have been submitted to the Clerk of this Court.

Petitioner is challenging the Second Circuit's decision in *Hydrolevel Corporation* v. *The American Society of Mechanical Engineers, Inc.*, 635 F. 2d 118 (2d Cir. 1980), which held that nonprofit, voluntary associations are liable under the federal antitrust laws for the improper and unauthorized acts of their volunteer members who have "apparent authority." This decision will have a severe adverse effect on professional associations that rely on the efforts of volunteer members to further their activities. The effect of this decision is to make ANS a guarantor of the good faith of its members. Thus, it is within ANS' interest to have this decision reviewed and reversed.

ANS is a nonprofit, scientific, and educational organization, with a membership of 13,000 engineers and scientists. ANS' main objective is to advance engineering and science relating to the atomic nucleus and allied sciences and arts. This is accomplished by encouraging research, disseminating information, holding meetings devoted to scientific and technical papers, setting voluntary standards, and cooperating with government agencies, educational institutions, and other organizations having similar purposes. Over 3,000 members volunteer their time and skills to ANS in order to accomplish these aims. ANS has 17 technical divisions and many committees through which members participate in ANS' activities and help to formulate ANS positions regarding the nuclear power industry. These division topics include such diverse subjects as nuclear criticality safety, fusion energy, and thermal-hydraulics. In addition, members contribute to a variety of ANS publications, including numerous nuclear standards and periodicals such as "Nuclear News," technical publications such as "Nuclear Science & Engineering," and monographs. A staff of 85 people assists the members in these volunteer activities.

The *Hydrolevel* v. *ASME* decision will greatly curtail ANS' activities. Under that decision, ANS will be placed in the

position of insuring the work product of its members. ANS cannot possibly perform the type of monitoring activities that such liability exposure entails. ANS does not have the daily contact, nor discipline and control, over its volunteers that a business has over its employees. ANS can vouch for a member's technical expertise and reputation for honesty and integrity; but it cannot vouch for his continuing honesty and integrity in each activity he is involved in, whether that be approving technical papers, setting standards, or any other facet of ANS' activities. Thus, if this decision stands, in order to insure that ANS will not be held liable for any dishonest acts of its volunteers of which it is unaware, ANS will have to severely curtail its many activities which depend on volunteers.

## I

## THIS DECISION HAS A CHILLING EFFECT ON THE AMERICAN NUCLEAR SOCIETY'S ACTIVITIES

ANS brings together skilled professionals as volunteers in order to use their professional and technical expertise in the nuclear field. Over 3,000 individuals participate in ANS activities which concern diverse and complex issues. It is therefore impossible for ANS to guarantee that an individual member, improperly motivated in a particular instance, could not misuse his position within ANS for either his own personal gain or that of his employer. However, under the *Hydrolevel* v. *ASME* "apparent authority" rationale, every activity in which member volunteers participate would have to be so guaranteed.

For example, ANS publishes a technical journal entitled "Nuclear Science & Engineering," which presents unreported technical papers concerning fundamental research in the nuclear sciences and engineering. It is conceivable that a volunteer reviewing papers submitted for publication could prejudice the economic interests of the author by refusing to publish simply for his own benefit or that of another. Under the *Hydrolevel* v. *ASME* decision, ANS would be potentially liable in a treble damage suit for any losses suffered by the author from such action.

It is also possible that an ANS committee member could use committee stationery and falsely purport to represent ANS in policy statements or public recommendations. If a member had reason to abuse his position, he could harm someone in a way that would not benefit ANS. Thus, ANS should not be held liable, especially since the individual member and the actual beneficiary of his misdeed would probably be held liable.

These are but two examples of how the *Hydrolevel* v. *ASME* decision affects ANS. With a paid staff of only 85, it is impossible for ANS to conduct its multi-faceted operation without utilizing volunteer assistance from its members. Thus, ANS must rely on its members' integrity to carry out its mission. However, under the *Hydrolevel* v. *ASME* holding, if one or more of its members has a hidden economic interest which he is able to exploit through his volunteer activities, ANS will be liable. The only alternative is for ANS to sharply limit its activities to those that can be accomplished by its paid staff, thus wasting the contribution that thousands of its members are capable of, and are making.

## II

## THIS DECISION DEPRIVES THE PUBLIC OF NUMEROUS BENEFITS CONTRIBUTED BY THE AMERICAN NUCLEAR SOCIETY

ANS makes numerous contributions to American society. One such contribution, for example, is the development and publication of standards for the nuclear industry. The types of standards developed are for designs, materials, parts, equipment, and their performance characteristics and reliability; methods of testing and rating; standards of practice, safety, and health; building codes; standard procedures for operating, processing, handling, storing, and transporting materials, parts, and equipment; and standards for selecting, training, and evaluating operators of equipment and processes.

To the consumer and to the public, the establishment of proper standards means quality control, product reliability, and consistent performance. In industry, standards are important as aids for purchasing and selling and for evaluating goods received and produced. In addition, standards serve to educate people designing, building, and operating nuclear power facilities.

ANS standards activities are carried on by its Standards Committee, which has numerous subcommittees under its direction involving more than 1,200 members.[1] Currently, 90 standards developed by ANS have been approved by the American National Standards Institute.[2] The Nuclear Regulatory Commission has referenced to approximately 15 ANS standards in its regulatory guidelines. A few of these are, for example: Administrative Controls and Quality Assurance for the Operational Phase of Nuclear Power Plants (ANS Standard 3.2 (1976)); Criteria for Accident Monitoring Functions in Light-Water-Cooled Reactors (ANS Standard 4.5 (1980)); and Medical Certification and Monitoring of Personnel Requiring Operator Licenses for Nuclear Power Plants (ANS Standard 3.4 (1976)).

The development of standards, like other ANS activities discussed, *supra* at 3-4, is also an area potentially subject to abuse by volunteers. Standards are supposed to be drawn to include all technically adequate equipment in the field. However, it is conceivable that one or more members of a standards committee could manipulate the development and/or interpretation of a standard to exclude some type of equipment, as occurred in *Hydrolevel* v. *ASME*.

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[1] ANS is presently developing standards in many important areas, such as: Nuclear Criticality Safety; Research Reactors; Reactor Physics and Radiation Shielding; Nonradiological Environmental Effects; and Radioactive Waste Management.

[2] The American National Standards Institute is the nationally recognized coordinator of voluntary standards development and the clearinghouse for information on national/international standards.

Clearly, the development of standards dealing with highly technical issues involves a tremendous amount of work. This work is accomplished by highly skilled—and highly paid—professionals who *volunteer* their time and skills. If the government had to assume this task, it would cost the public millions of dollars. Not only would the cost be significant, but the development of these standards would surely add more red tape for industry to deal with at a time when the administration is trying to reduce the impact of regulations on industry.

The alternative to the government assuming ANS' activities is that the standards will not be developed at all, which would undoubtedly result in a reduction in quality control, product responsibility, and consistent performance. Such an occurrence could diminish the safety margin of an industry in which accidents may have serious consequences. To use anything but the most carefully conceived standards for nuclear power is grossly reckless. Thus, a likely result of the *Hydrolevel* v. *ASME* decision is to seriously reduce the amount of volunteer help and thereby delay the use of nuclear energy as a viable solution to our energy crisis. However, as long as ANS must be a guarantor of its volunteers' activities, the contributions that ANS makes to the development and acceptance of safe nuclear power are in jeopardy.

## CONCLUSION

ANS has reviewed ASME's Petition for Writ of Certiorari. ANS respectfully joins ASME's contentions that a nonprofit, voluntary membership organization: (1) should not be held liable for "unintentional participation" in a conspiracy to restrain trade and to monopolize, in violation of Sections 1 and 2 of the Sherman Act, on a theory of negligence; and (2) should not be held strictly liable under the antitrust laws for all acts of its volunteer members within the scope of their "apparent authority," when (a) the acts were neither authorized nor ratified by the organization; (b) the members did not intend to, and did not in fact, benefit the organization by their actions; and (c) the members actively deceived the organization for their own purposes and benefit.

Respectfully submitted,

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May, 1981